

## **MINUTES**

### **MONTANA HOUSE OF REPRESENTATIVES 57th LEGISLATURE - REGULAR SESSION COMMITTEE ON NATURAL RESOURCES**

**Call to Order:** By **CHAIRMAN CINDY YOUNKIN**, on January 29, 2001 at 3:00 P.M., in Room 152 Capitol.

#### **ROLL CALL**

**Members Present:**

Rep. Cindy Younkin, Chairman (R)  
Rep. Rick Dale, Vice Chairman (R)  
Rep. Gail Gutsche, Vice Chairman (D)  
Rep. Keith Bales (R)  
Rep. Dee Brown (R)  
Rep. Gilda Clancy (R)  
Rep. Aubyn A. Curtiss (R)  
Rep. Larry Cyr (D)  
Rep. Bill Eggers (D)  
Rep. Ron Erickson (D)  
Rep. Christopher Harris (D)  
Rep. Linda Holden (R)  
Rep. Joan Hurdle (D)  
Rep. Rick Laible (R)  
Rep. Jeff Laszloffy (R)  
Rep. Douglas Mood (R)  
Rep. Bob Story (R)  
Rep. Brett Tramelli (D)  
Rep. David Wanzenried (D)

**Members Excused:** Rep. Rod Bitney (R)

**Members Absent:** None.

**Staff Present:** Holly Jordan, Committee Secretary  
Larry Mitchell, Legislative Branch

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: HB 327, 1/18/2001; HB 320,  
1/18/2001

Executive Action:

**HEARING ON HB 327**

**Sponsor:** REP. BUTCH WADDILL, HD 62, Florence

**Proponents:** Jim Chaffin, Missoula  
Dave Zacha, Corvallis  
Bill Richter, Choteau  
Candy Richter, Choteau

**Opponents:** Carol Lambert, Women Involved in Farm Economics (WIFE)  
John Youngberg, Montana Farm Bureau  
Cary Hegreberg, Montana Wood Products Association  
John Bloomquist, Montana Stock Growers  
Janet Ellis, Montana Audubon  
L. Scott Blackman, Sterling Ranch Co.  
Holly Franz, atty., Sterling Ranch Co.

**Opening Statement by Sponsor:**

***{Tape : 1; Side : A; Approx. Time Counter : 0.6}***

**REP. BUTCH WADDILL, HD 62, Florence,** stated that HB 327 is a bill of common sense. The bill is very controversial. The primary purpose of the bill is to allow a property owner whose property has no access, to have a means of bringing it to the court to let the court decide what can be done. He went over some key definitions of the bill. They were easement, right of way and trial. The meat of the bill is on page 3, lines 19 & 20 and on page 4, section 2, paragraph 70-30-107. He also stated that current statute does allow a person with property, with a farm or residence on it, to take an issue like this to court.

**Proponents' Testimony:**

***{Tape : 1; Side : A; Approx. Time Counter : 7.4}***

**Jim Chaffin, Missoula,** stated that he has inherited property that has been in his family since the turn of the last century. He has been denied access of that land. He stated that he uses the property for recreation. He stated that he has spent a lot of time with attorneys but cannot win a case. He wants a 50/50 chance that when he gets to court he could win. He stated that he takes 100% disabled combat veterans to his property to hunt. A lot of them need the meat. He tried to negotiate with the surrounding property owners but was told that he would not be allowed access. He stated that he has lost a lot of money trying to fight this. He should not have to walk into the property. There is an easy way in there as the road has been used by his

family since before 1917. The disabled veterans cannot hunt without easy access into an area. He does not charge the veterans to hunt on the land. His case was dismissed without prejudice. The defendants wanted the case dismissed with prejudice in his and his 13 year old son's name. The defendants then offered him \$5,000 for the 40 acre parcel which has timber and wildlife. He hoped for a do pass.

**Dave Zacha, Corvallis**, stated that he grew up below **Mr. Chaffin's** property. He stated that **Mr. Chaffin** simply wants to get to his ground. The road to that property has been there and he should be able to use it. His family has used it historically and that should not change with new ownership.

**Bill Richter, Choteau**, stated that his family was the losing party in *Richter v. Rose* which is cited in the bill. That case was brought to the Supreme Court. He stated that he has property in Kalispell that is in question. The lands were acquired by his family in 1958. Historically they have had access to the land. Currently they are landlocked. His land is about 40 acres and has about \$80,000 worth of timber on it. He went over the history of his lands.

**Candy Richter, Choteau**, reiterated what her husband, Bill, said. She talked about the Forest Homestead Act. She presented the committee with copies of maps showing her property **EXHIBIT (nah23a01)**.

**Opponents' Testimony:**

**{Tape : 1; Side : A; Approx. Time Counter : 33.8}**

**Carol Lambert, W.I.F.E.**, stated that the priority of her organization is private property rights and HB 327 is an invasion of those rights. She stated that it is unfortunate that the proponents have lost their private property rights but that does not give the legislature, or anyone else, the right to take someone else's private property rights. She stated that W.I.F.E. stands in strong opposition of the bill.

**John Youngberg, Montana Farm Bureau**, stated that he is sympathetic to the proponents but there are some very problematic areas with passing HB 327. He stated that the E.Q.C. subcommittee studying eminent domain briefly discussed this issue and nothing came out of that discussion. If this bill were to pass it would not just allow access, it would allow the easiest access. Any landowner could carve the easiest access across another property to gain access. He stated that this could be a sub-divider's dream. He urged the committee to oppose the bill.

**Cary Hegreberg, Montana Wood Products Association**, stated that property rights should be on both sides of the fence. He stated that this is a very tough bill and his association has interests on both sides. They are not comfortable with the bill as the solution. He stated that the passage of this bill may lead to unforeseen problems.

**John Bloomquist, Montana Stock Growers**, stated bills similar to HB 327 have come up in past sessions. It is a very difficult issue. His concerns are that this would really open up a lot of property to access and create some changes that don't exist presently. He stated that the committee should consider that this bill would let the feds off the hook in some land access situations. The most common reason that these lands get landlocked is that a property owner sells his/her property and the new owners will not allow access over the property anymore. Montana Stock Growers rise in opposition of the bill.

**Janet Ellis, Montana Audubon**, submitted written testimony **EXHIBIT**(nah23a02) .

**L. Scott Blackman, Sterling Ranch Company**, submitted written testimony **EXHIBIT**(nah23a03) .

**Holly Franz, atty., Sterling Ranch Company**, stated her firm has been involved in three separate lawsuits regarding access through the Sterling Ranch. This bill allows private individuals to decide where to put roads to gain access to their property. She stated that this disrupts cattle and farm operations and there is a question of who maintains the roads. She stated another problems is that section 2 of the bill eliminates the requirement that a condemnor has to pay for the litigation fees. She stated that HB 327 is a step in the wrong direction and urged the committee's opposition.

**Questions from Committee Members and Responses:**

**{Tape : 1; Side : A; Approx. Time Counter : 49.0}**

**REP. BALES** asked **REP. WADDILL** to explain what the added language on page 2, line 26 does. **REP. WADDILL** stated that was one of the housekeeping changes put in by legislative services.

**REP. STORY** asked **Mr. Bloomquist** is there is some way to craft some protection for people who have had historic access to their land. **Mr. Bloomquist** stated that is one of the problems. The landowners must get permission from the new owners to protect the new owners' rights. Someone purchasing land that has no access is notified of that so they can go through the legal process to

gain easement. **REP. STORY** stated that his concern is not about people who buy property when they know that there is not access to that. His concern is for the person that owns land that historically has had access and then one day they no longer have access. He asked if something could be constructed that would allow the same historic access. **Mr. Bloomquist** stated, given the changing circumstances in landownership, he would advise any clients that have access through a neighbor's property to negotiate an easement as soon as they can.

**REP. ERICKSON** asked **Mr. Bloomquist** to explain the nature of the evidence, what do you have to do to prove there was a public road? **Mr. Bloomquist** stated that the type of evidence depends on what you are trying to establish. The maps are a matter of historical documents. One of the theories is the RS2477 Road Rights of Way which states that the government needs access so that they can sell lands. When you get into the prescriptive easement scenario you have to show several elements. The most important of those elements would be adversity.

**REP. HOLDEN** asked **Mr. Bloomquist** about the comments on the federal government. **Mr. Bloomquist** stated that, under federal law, if you have a private in-holding surrounded by forest service or BLM land, they can't deny a private landowner access. You have to go through some permitting process, which may be difficult and long, but they must allow you access. If this bill passes there may be arguments saying that the landowner no longer has to use federal lands to gain access because they could gain access through a neighbor's property.

**REP. STORY** asked **Ms. Franz** about two of the cases that she was involved in with Sterling Ranch regarding a road for access to logging. **Ms. Franz** stated that the road was not historically used for logging but that was the use that the in-holding landowner wanted to put it to. Followup by **REP. STORY** - on page 4, number 19 of the public uses list is temporary logging roads, this bill wouldn't be exempt from that type suit anyway, would it? **Ms. Franz** stated that the case she worked on was not for eminent domain, it was for a prescriptive easement, and they did not use the statute in question. Sterling Ranch was willing to allow use of that road to remove logs if the owners would sign a liability agreement and the answer to that was the lawsuit. Followup by **REP. STORY** - on page 3 there is some editorial language and under that particular use of eminent domain for logging roads it says something to the effect that the land of state institution was exempted from eminent domain. There is a major change in that it says that you can't use those lands for logging roads, is that the same meaning or not? **Ms. Franz** stated

that she anticipates that the argument would be that the exception only applied to subsection 19.

**Closing by Sponsor:**

***{Tape : 1; Side : B; Approx. Time Counter : 0.1}***

**REP. WADDILL** addressed **REP. BALES** question stating that controlled access facilities means interstate highways. He stated that this is an extremely tough issue. The opposition is invasion of private property rights, easiest access, subdivider's dream, public land could be condemned and a sprawl bill. He contended that you could use those reasons in either situation. He said offering \$5,000 for 40 acres could be for someone who may want to subdivide the property. He stated that on page 3, line 18 talks about private roads leading from highways to residences and farms and when you look at the one below it, the only real difference seems to be that people are living on one and not on the other. All the bill is seeking to do is to allow a person who does not have access to his/her property to have the ability to take it to court after making an offer of easement. He stated that there are good arguments for and against the bill and hoped for a do pass.

**HEARING ON HB 320**

**Sponsor:** **REP. RICK LAIBLE, HD 59, Victor**

**Proponents:** **Frank Gilmore, Montana Tech**  
**Cary Hegreberg, Montana Wood Products Association**

**Opponents:** **Richard Parks, NPRC**  
**Toby Day, Montana Wildlife Federation**  
**Anne Hedges, MEIC**

**Opening Statement by Sponsor:**

***{Tape : 1; Side : B; Approx. Time Counter : 3.8}***

**REP. RICK LAIBLE, HD 59, Victor,** stated this is not a new and complicated bill but rather a clarification of an existing bill. It is about public school and the fiduciary duty required by the land board to exercise due diligence in the maximizing of the income off of these lands. He gave a background on School Trust Lands. He stated that you cannot favor additional school funding and oppose this bill at the same time, they are exclusive of one another. Litigants appealing any commerce on school trust lands are not suing the state or the industry, they are suing the

trusts and the schools themselves. 77-1-110 has been in effect since 1995. The judiciary has neglected to enforce the statute because of the confusion over whether or not the land board or the department was wrongfully enjoined or restrained. This bill does not do anything different than what the original intent was. It is a clarification and reaffirmation of what our responsibility is to the beneficiaries of these trusts. The changes to the existing bill are on page 1, lines 13 and 14 and on lines 16 and 18. He stated that the reason for the bill is that the existing language leaves to interpretation as to whether the bonding requirement, for the payment of damages incurred by the trust beneficiary, is a result of the land board or the department being wrongfully enjoined or restrained. More importantly, this reaffirms the obligation to protect and defend the Montana Constitution. The clarification will strengthen the commitment to public schools and encourage all participants to mediate rather than litigate. One of the questions that you may hear from the opponents, must the timber sales or the grazing permits, mining permits, oil and gas permits, etc., on trust lands, meet MEPA and other environmental standards? The answer is yes, this bill doesn't change the original bill. They may also ask, will this limit access to our court system and due process? The answer is no, this is an existing law that has had no adverse impact. They may say that timber harvests will be proposed beyond sustainable yields. That is not so, all environmental laws still apply and are still in effect. What happens if the litigant prevails in an injunction or restraining order? The bond is then released. The bonding amounts are set by the land board or the department. He asked for a do pass.

**Proponents' Testimony:**

***{Tape : 1; Side : B; Approx. Time Counter : 9.8}***

**Frank Gilmore, Montana Tech,** stated that he supports this bill because it removes one of the many barriers that DNRC faces in trying to properly manage the trust lands. He stated that DNRC does an outstanding job with the resources they have and the rules and regulations they have to operate under. He stated that Montana Tech currently owns 59,606 acres and from those acres they get \$322,000 a year or approximately \$6.00 per acre. That's just barely what unimproved land would bring in with taxes. To make it worse, \$140,000 of that money comes from fewer than 1,000 acres held at Echo and MacGregor Lake. Anything you can do to improve the income from this asset should be done.

**Cary Hegreberg, Montana Wood Products Association,** stated that the original bill that set up this statute intended to do what HB 327 does. This bill simply stated that if an injunction is

sought a bond will be posted. It will also limit lawsuits. He stated that the Swan State Forest, which has 40,000 acres of highly productive forest land, has had virtually no timber harvesting activity in the last decade. This land is assigned to the public school system, our K - 12 education. The land could ecologically support the harvest of about 10 - 12 million board feet of timber every year, forever. That would generate about 2.5 million dollars for public schools yearly. It would employ about 200 people. Instead, Pyramid Mountain Lumber Company, right down the road, has announced it's closure. Our schools are underfunded, our teachers are underpaid and our citizens are overtaxed. This is all due to procedural lawsuits under MEPA. In recent years we have seen lawsuits against the U.S. Forest Service virtually grind that agency's land management activities to a halt. We don't want our state trust lands to succumb to the same tangled web of litigation that has beseeched our federal lands. Opponents to this bill may claim it is unconstitutional. He submitted a copy of a legal ruling from a chief administrative law judge in Washington D.C. **EXHIBIT(nah23a04)** and went over the same. He stated that HB 320 is good trust management, good fiduciary management and it is good public policy. He urged a do pass.

**Opponents' Testimony:**

***{Tape : 1; Side : B; Approx. Time Counter : 18.6}***

**Anne Hedges, MEIC**, stated this bill needs an amendment to clarify its intent. This bill talks about the Montana Constitution not federal law. Article 2, section 16 of the Montana Constitution says that courts of justice shall be open to every person and speedy remedy afforded for every injury a person, property or character. It also states that right and justice shall be administered without fail, denial or delay. This provision is very important and must be balanced with the state trust land issue. She passed out a copy of a case **EXHIBIT(nah23a05)** and went over it. She then handed out a copy of 27-19-306 and explained the highlighted language and its relevance with Exhibit (5) and the bill **EXHIBIT(nah23a06)**. In order to make this bill pass constitutional muster you need to insert "unless the interests of justice require." Without that you are asking for trouble from the courts. She strongly urged the amendment and a do not pass if the amendment isn't adopted.

**Richards Parks, NPRC**, submitted written testimony **EXHIBIT(nah23a07)**.

**Toby Day, Montana Wildlife Federation**, stated that this bill limits the public's ability to comment on what DNRC is doing. A



lot of money is spent by non-profit organizations to litigate and to post a bond would be a burden on it's members.

**Informational Testimony:**

***{Tape : 1; Side : B; Approx. Time Counter : 29.4}***

**Bud Clinch, DNRC**, stated that there are some specifics that, in discussion, the committee may wish to hear about. These specifics are, the full request for injunction bonds that the department has pursued since the passage of this bill, the dollar values at stake and the judicial response to that as well as the lost revenues for trust beneficiaries. He stated that he and the trust lands' attorney, Tommy Butler, are available for questions.

**Questions from Committee Members and Responses:**

***{Tape : 1; Side : B; Approx. Time Counter : 30.5}***

**REP. BROWN** asked **Mr. Parks** about his statement that someone should have to "bet the farm" and stated that when she thinks of posting a bond, that is different than gambling the farm, correct? **Mr. Parks** stated that, as a practical matter, she is not right. If an adjacent land owner fundamentally disagrees with a decision that is made his only option at that point is to go to court. That person has very clear interests in how the results would come out. Nevertheless, he may be required to post bond which may easily require him to take a financial risk which may be \$100,000. **REP. BROWN** followed up asking if he was suggesting that an average type of bond would cost \$100,000. **Mr. Parks** stated it would all depend on the particulars of the case.

**REP. ERICKSON** asked **REP. LAIBLE** if he would consider Anne Hedges' amendment friendly. **REP. LAIBLE** stated no he would not. Followup by **REP. ERICKSON** - Why not? **REP. LAIBLE** stated it goes against the total intent of the bill to allow some sort of responsibility on the part of the litigant to perfect his opposition to a particular project. The intent of the bill is to put back in place what the original intent was where a bond would be submitted and not left to the decision of the judicial system. This amendment would cause a loss of the sense of clarity. **REP. ERICKSON** followed up stating that the bill says that we can tell legislation that something is constitutional. He asked if that seems strange to him, isn't that up to someone else. **REP. LAIBLE** stated this bill has been in effect since 1995 and there has not been any constitution complaints filed against this. HB 320 just clarifies the intent of the 1995 bill. **REP. ERICKSON** followed up asking if he can deny that some people do worry about the constitutionality of this. **REP. LAIBLE** stated that he is correct

but there is and probably will be, with every law on the books, some sense of unconstitutionality but that is not necessarily just on this law.

**REP. MOOD** asked **Mr. Butler** to read the highlighted language from Exhibit 6. **Mr. Butler** read the same. **REP. MOOD** then stated that, to his understanding, there is permission, via this language, to go over the required bond, he asked if that is correct. **Mr. Butler** stated that language provides that the court can exceed the \$50,000 limit if that is in the interest. **REP. MOOD** followed up asking if school trust lands are a full blown trust fully recognized by all of the courts. **Mr. Butler** stated yes they are and the Supreme Court has recognized that school trust lands, established under the state's enabling act, are a bonafide legal trust. **REP. MOOD** then asked if the beneficiaries should be protected by a bond for those cases where someone is pursuing an activity to generate more money for the trust. **Mr. Butler** stated that under existing Montana trust law a trustee has the duty to be prudent and to protect the interest of the beneficiary. Article 2, section 3 of the constitution requires the state to act with utmost responsibility to protect the financial interest of all of the trust beneficiaries. He then read from the constitution. **REP. MOOD** followed up stating that there has been some question in committee on whether or not we can legally require a bond in this situation. **REP. MOOD** then asked **Mr. Butler** if he was aware of any cases which have determined one way or the other. **Mr. Butler** stated yes. This legislature has repeatedly required bonds in order to pursue legal remedies. The most prominent of these is in the Coal Act. That provision has been held constitutional numerous times by numerous courts. The most celebrated case of an appeal bond was probably in *Penzoil v. Texaco*. He then went over that case.

**REP. BROWN** asked **Mr. Clinch** what has been the history of the department's requirements for bonding. **Mr. Clinch** stated there have been four instances since 1995 where the department has requested a bond. The bond amounts were based on what the department determined to be the lost interest income during the time period that they were enjoined from action. The amounts of those were: \$6,500; \$17,200; \$5,200 and \$68,400. Two out of the four were rejected by the courts. There are two litigations pending right now but it is not in the best interests of the department to pursue an injunction bond.

**REP. DALE** asked **Mr. Butler** what is the largest revenue stream that has ever been forgone in actions where DNRC has been sued to stop development of the state sections. **Mr. Butler** deferred the question to **Mr. Clinch** who said there have only been four

situations where they have requested an injunction bond. The highest amount of revenue probably had to do with the Middle Soup Timber Sale on it's initial presentation, that was a \$1.2 million project. The DNRC was denied the injunction bond. **REP. DALE** followed up stating that many of these state properties are allocated to specific institutions. Does this not subject those institutions to an inequality of funding based on where their state lands are. If they are adjacent to a wilderness area they would be less likely to be acceptable to some form of development than other lands in a less desirable place. **Mr. Clinch** stated that lands they are managing are subject to a wide variety of objection depending upon where they are located and the affected parties that may want to bring suit. The simple fact is that DNRC can propose identical projects in different corners of the state, some may go uncontested, some may be contested at every level of public involvement that they pursue. **REP. DALE** followed up asking **Mr. Clinch** if he is aware of any situation where an individual person has filed suit to stop DNRC in it's actions for approval of such actions. **Mr. Clinch** stated the entities that have been litigants have been a wide variety from small to large. Some litigation has been brought forth by individual citizens. Of the four cases where DNRC has requested injunction bonds, three of the four were brought by various groups who have more than enough money to post those bonds.

**REP. CURTISS** asked **Mr. Clinch** if the source of income in the Kalispell area is a particularly environmentally sensitive area. **Mr. Clinch** stated that area is midway between Kalispell and Whitefish. The litigation has to do with social economic impacts not environmental issues. **REP. CURTISS** followed up asking if there is a well defined definition of "old growth." **Mr. Clinch** stated no and that is part of the problem.

**REP. ERICKSON** asked **Mr. Parks** what language he would want to put in the bill to deal with his concerns. **Mr. Parks** stated that he is not sure that he can come up with language. It is important to understand that state trust lands involve a lot more values than timber sales. He wanted to be sure that everyone understands that this bill addresses the entire bag of resources.

**REP. WANZENRIED** asked **Mr. Clinch** why the DNRC doesn't appear as proponent to this bill. **Mr. Clinch** stated that HB 501, the original bill from 1995, was brought forth by the DNRC. This bill was not a priority during this legislative session. He stated that, for that reason, he would be reluctant to appear as either a proponent or opponent of the bill. **REP. WANZENRIED** followed up asking if that means that he will not testify for or against the legislation at all. **Mr. Clinch** stated that is not necessarily true. **REP. WANZENRIED** followed up asking if he would

agree that the State Land Board perspective in applying the constitution involves more than the Article that has been referenced, that there is a section of law that guarantees a citizen's right to the courts. **Mr. Clinch** deferred the question to **Mr. Butler**. **REP. WANZENRIED** restated the question asking if he would agree that the members of the State Land Board are sworn to uphold the constitution. Are they required to apply all of the constitutional requirements and not isolate the ones being referenced in the bill. **{Tape : 2; Side : A; Approx. Time Counter : 0.1}** **Mr. Butler** stated appeal bonds have been held to be constitutional. There are a number of jurisdictional bars that are placed on public interest groups and citizens who want to challenge governmental actions. For example, the statute of limitations. Indigency is not a fundamental right to challenge governmental action. Indigency has been recognized as a status which will allow you to seek certain actions in district court, such as divorce or adoption. There is no court that has said, if you are an indigent citizen you can forego the filing of an appeals bond to challenge governmental action. The groups who file suit are more than capable of paying for an appeal bond for \$5,000 or \$10,000. **REP. WANZENRIED** followed up asking if this legislation precludes the possibility of someone with lesser assets the opportunity to have access to courts. **Mr. Butler** stated there is some confusion about access to the courts. This bill is tailored to injunctive relief. That does not preclude anyone from filing suit, it merely precludes them from stopping the action. It also takes into account the constitutional right of the beneficiaries of these trusts. The purpose of HB 320 is to protect the constitutional rights of the beneficiaries to receive that income during the pendency of these actions.

**Closing by Sponsor:**

**{Tape : 2; Side : A; Approx. Time Counter : 4.6}**

**REP. LAIBLE** stated that this bill does not expand the original law, it only clarifies it. Bonds are constitutional and are required by the logging and mining industry. There is a constitutional right for the beneficiaries of these school trust lands. It is important not to miss the point that the ones who lose out are our public schools. We are losing income for our public schools as the original grantees of these properties had envisioned. It is important to note that the amount of the written undertaking may not exceed \$50,000 unless an interest of justice is required. He asked for a do pass of the bill.

**ADJOURNMENT**

Adjournment: 5:25 P.M.

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REP. CINDY YOUNKIN, Chairman

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HOLLY JORDAN, Secretary

CY/HJ

**EXHIBIT** (nah23aad)